No. 15360

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

MAUD L. ELFER,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I.

a. Appellant continues to maintain that family allowances are a gift or gratuity and that the payor-payee relationship is directly between the United States and the benefited dependent to the exclusion of other persons.

Appellee does not "assume" that family allowances are a gift. Appellant offered probative material in support of this contention. Appellant offered the reference to Internal Revenue Service Cumulative Bulletin 1942-2, page 53, as an indication of the reason given by the donor, United States, for exempting its own gift from its own tax and the words on page 9, line 14, of its brief are a literal quote from the IRS Bulletin — not a paraphrase. Appellee does not favor us with a statement by the IRS or anyone else as to why the various payments shown on page 2 - 3, lines 21 - 2, are exempted from income tax but we submit that the mere exemption of *other* payments *without stated reason* impairs in no way the probative value of a statement that family allowances are exempt because, in the words of the donor, they are a "gift".

Appellant, of course, never contended that family allowances were concerned in *Hatch* v. *Ferguson*, 57 Fed. 966, 68 Fed. 43 (9th Cir.-1895). Appellant does not concur in appellee's conclusion that its position is not supported thereby, but leaves that determination to the Court. The Court in *Hatch* v. *Ferguson* construed Washington community property law and we are content with the implications of that case.

We have examined carefully appellee's cited case of *Kircher* v. *Murray*, 54 Fed. 617; 60 Fed. 48 (5th

Cir. - 1894), and can only conclude that the dicta of the Fifth and Ninth Circuits differ in this respect. *Kircher* is obscurely phrased but scrupulous examination reveals that the only holding in the case is a dismissal in law because plaintiff's title (if any) is equitable. The action was a law action, trespass to try title, and plaintiff had no legal title or claim to the land in question. The action was therefore dismissed with ample dictum to the effect that plaintiff had equitable (*i.e.*, arising from community property) title. To the same effect was the so-called "affirmance" in 60 Fed. 48.

Appellant admits that the dictum in *Kircher* is persuasive of the proposition that a land grant given for entry into the armed forces is acquired by onerous and not lucrative title as in the case of a true gift. But, law or dictum, the Ninth Circuit on almost identical facts and law, says acquisition is by lucrative title. In *Kircher*, the law of Texas which gave rise to the land grant is paraphrased (at 622) to the effect that that section offered a bounty of land for volunteers in the auxiliary corps for three months' service. In *Hatch*, the lower court (57 Fed. 966) held that title to the land received by reason of service in the Mexican War was separate property, (at 971) "title having been acquired by him prior to . . . marriage" and the Ninth Circuit affirmed this holding (68 Fed. 43)

with the significant dictum already quoted in appellant's brief, page 9, last line. The land in question appears to have been given by reason of the Act of February 11, 1847 (ch. 8, 9 Stat. 123) which was titled "An Act to raise for a limited Time an additional military Force, and for other Purposes" and which stated in Section 9 (at 125), "That each [soldier] . . . who has served or may serve during the present war with Mexico . . . shall be entitled to receive . . . one hundred and sixty acres . . . ." We can distinguish this law in no significant particular from the Texas law construed in *Kircher*. Yet the dicta from Fifth and Ninth Circuits are squarely opposed.

Appellant takes issue with appellee's quotation from *Johnson* v. *Johnson*, 23 S.W. 1022 (1893), (p. 3, appellee's brief) citing 32 Tex. Jur. 769. The citation and quotation are from *Sterrett* v. *Sterrett*, 228 S.W. 2d 341 (1950), and are not even mentioned in *Johnson*. *Johnson* is correctly cited and quoted in appellant's brief, p. 10.

Appellee cites *Hokenson* v. *Hokenson*, 23 Wash. 2d 908, 162 P. 2d 592 (1945), (appellee's brief, p. 4) and appellant admits the correctness of the quoted dictum. As pointed out in appellant's brief (p. 16), it made no difference in the case whether the Washington court believed the family allowance to be sep-

arate or community as the trial court could have disposed of either in any reasonable manner. *Leonhard* v. *Leonhard,* 147 Wash. 311; 265 Pac. 1118 (1928).

We concede that appellee has quoted precisely and correctly from *Sterrett* v. *Sterrett* (brief, p. 5). We can only argue with all respect to the Texas court that it was fatally misinformed. Its decision in favor of the community property status of the money appears (at 343) to be bottomed on *Sherburne's Administrator* v. *U. S.*, 16 Ct. Cl. 491, and the erroneous assumption that the word "allowances" means the same thing at all times and places. Reading *Sherburne* shows plainly that the allowances treated in that case were the allowances of commissioned officers and senior non-commissioned officers, the latest version of which was the subject of the Pay Readjustment Act of 1942 which is explained on page 3 of appellant's brief; *not* the separate and distinct dependents' allowances of the law of seven days later. If such allowances are the same thing, we must answer in some manner the unanswerable: Why did Congress make them the subject of separate legislation? If family allowances are compensation for services rendered, why did Congress say: "Entitlement to and payment of any family allowance . . . to the dependent . . . shall not be contingent upon pay accruing to such enlisted man or upon the monthly pay of such man being re-

duced by or charged with any amount" (57 Stat. 580), while stating as to first three-grade allowances (56 Stat. 364), "Enlisted men entitled to receive allowances for quarters or subsistence, shall continue . . . to receive such allowances while . . . in a pay status . . . ."? Note carefully the difference. The top grade enlisted men draw such allowances in their own right and only when in pay status, *i.e.*, periods of absence without leave, etc. would result in forfeiture of pay or compensation and the concurrent allowances. The dependents of the lower grades draw different allowances in their own right and regardless of whether compensation accrues to the military man or not. Can it still be contended that family allowances are compensation for services rendered? If they be such compensation, why are they not subject to court-martial forfeiture [they are not] along with the rest of the erring soldier's pay? If they be compensation for services rendered to the United States by the husband-wife community, what is the status of a family allowance paid to the "former wife divorced" (56 Stat. 381, line 40) or the "sister of such enlisted man" (*ibid*, line 43)? Would appellee have appellant sue the marital community for an erroneous overpayment to the husband's sister? When we employ such *reductiones ad absurdum*, it becomes clear that, regardless of the superficial similarity to the *Sherburne* "allow-

ances" which misled the *Sterrett* court, they are really separate and distinct and the Class F family allowances are a gift to the dependent.

A similar plan was in operation during World War I as authorized by the Act of October 6, 1917 (ch. 105, 40 Stat. 398 at 402 *et seq*) and the relationship from the United States to the donee was, if anything, clearer than in the present law. In Section 204 (at 403) of that law it was stated, ". . . a family allowance of not exceeding $50.00 per month shall be *granted* [i. s.] and paid by the United States . . . ." The mechanics of the paying procedure differed slightly but be it sufficient to say that it resembled World War II procedure in that it provided for a compulsory allotment by the enlisted man to his dependent and a grant by the United States.

Even the weak reed of the *Kipping* case, 209 S.W. 2d 27 (1948), (appellee's brief, p. 6) is not available to appellee here. *Kipping* held that the family allowance was (at 29) ". . . an integral part of his contract of enlistment. It was an inducement for enlistment, which in this case was voluntary, and as an incident of the contract was doubtless enforceable at law." From the facts stated in *Kipping*, it appears that Kipping enlisted voluntarily on November 2, 1942, and was constructively aware of the existence of the Act

of June 23, 1942, although whether it formed, in law, a *quid pro quo* in his enlistment contract is highly doubtful. Counsel for appellee states on page 6, line 10, "It was an inducement for enlistment, which in that case, as well as in the case at bar, was voluntary . . . ." We assume it to be appellee's purpose to show that Schlafer's enlistment (a voluntary one, we concede) was on the same *quid pro quo* basis as that found by the court in *Kipping*. Schlafer, it should be noted (R. 8, line 19) enlisted four (4) days before the law was passed! If one may make a true bilateral contract with the sovereign concerning military service (and such is doubtful in view of the sovereign's power to alter unilaterally the terms of the contract: *e. g.*, to discharge prematurely, to hold in service because of war or national emergency, to decrease pay and yet hold to the enlistment contract), one may surely not write into or imply into such contract, a consideration or gratuity which does not even exist! So much for appellee's adoption by reference of the reasoning of the *Kipping* case.

We must not lose sight of the fact at any time, that the sole purpose of the foregoing exposition has been to show the identity of the payee-donee of lawful payments of family allowances. Appellant maintains that the dependent was the sole party receiving such from the United States. If lawful, such payments

were her separate property. If unlawful, hers is the obligation to repay.

b. We quite agree that appellee does not wish to repay. We find no legal significance therein.

c. We do not concede that "appellant abruptly concludes"etc. We feel that thus far appellant has attempted to demonstrate only the *legal entity* (wife separately or marital community) which was the recipient of the unlawful payments. Having shown it to be the dependent in the first instance (regardless of whether she ultimately passed the benefits to the community) we feel that particular legal consequences flow therefrom. We feel that item "c." in our brief is a conclusion of law which, if the wife received the money as a separate gift, is inescapable.

d. Appellee's citations under point "d." insofar as they concern the separate obligation of a wife to repay on a community obligation *incurred by her husband*, we quite concede. The wife has no such obligation. If the marital community by and through the husband (Schlafer) received the overpayments, no separate obligation is imposed on the wife. But such was not the case. The *Meng* case (appellee's brief, p. 7), the *McLean* and *Yakima Plumbing* cases (p. 8), on their facts, are not in point. Counsel insists that a wife under community property law cannot be liable

to pay a debt unless she has made an "independent promise of some sort". Counsel apparently disregards the entire field of quasi-contracts or contracts implied in law. In such contracts, no one makes an actual promise. Yet the law implies one. Appellant's entire position in this case is based on the fact that, payments having been made by mistake, the law *implies* a promise to repay. The payee having been the wife, the implied promise flows from the wife. Appellee's own citation of *Yakima Plumbing Supply Co.* v. *Johnson*, 149 Wash. 257, 270 Pac. 829 (1928), supports appellant's position wherein it is said (at 260):

> "The husband is personally liable in each instance [*i.e.*, for a separate debt contracted by him *or* a community debt contracted by him] *because he contracted the debt* [*i. s.*], and the community property is liable in the latter instance because the debt is contracted in the conduct of a community business; . . ."

The *Yakima* case in the underscored portion makes clear the reason in Washington law for holding the husband separately liable on a community debt — simply because he was the contracting party and bound himself as well as the community for which he acted. In this case the reverse is true and the corollary law must be applied. The quoted portion of the *Yakima* case should be read as follows: "The [wife] is per-

sonally liable in each instance because [she] contracted the debt . . . ."

Appellee further contends that appellee's only overt act was in continuing to draw, during the litigated period, the allowance of $50.00. Appellant has never charged bad faith on the part of appellee. However, an action in restitution does not, of course, rest on fraud or bad faith. See 46 Am Jur, *Restitution and Unjust Enrichment*, p. 99.

Appellee cannot make the argument that the then husband drew overpayment in any sense. As stated in our brief at page 3, the Servicemen's Dependents Allowance Act provided *only* for the disbursement of public money to dependents of "last four graders", the payments of such money to any other people were unlawful, the trial court so found (R. 10, Conclusion of Law III) and appellee has never contested such a conclusion. He cannot do so now.

II.

Appellee's argument under Section II of his brief completely eludes appellant. Appellee states (p. 11):

> "At no time has it been claimed or established that Appellee was not entitled to the monthly family allowance of $50.00."

Appellant *claimed* (R. 3):

> ". . . defendant Maud L. Elfer was the wife of a . . . [sailor] and receiving family allowance as wife . . . . the serviceman by reason of whose naval service . . . defendant had heretofore received . . . allowance, was promoted to an enlisted grade . . . to which . . . no . . . allowances accrued. . . . payments continued . . . erroneously . . . and an overpayment . . . resulted."

We cannot spell out our claim much more clearly nor can we conceive that we should be required to.

Appellant *established* (R. 8):

> ". . . Schlafer was promoted to . . . one of the first three pay grades within the meeting [sic] [meaning?] of the . . . Act . . . .
>
> "[R. 10] That the payments . . . were made . . . in violation of law, inasmuch as . . . to which grade no such . . . allowance . . . appertained."

If appellee can possibly be *entitled* to a payment made in error and violation of law, we cannot understand the reasoning. As we noted in I, *supra*, appellee has taken no exception to the Conclusion of Law so quoted and is bound by it.

In view of appellee's comments (page 11, line 5 *et seq*) on the failure of the husband to waive quarters allowance, we shall labor what we consider to be clear law in order that the Court may not err in its de-

termination of *which party* was overpaid. Under the Dependents Act, the dependent was entitled to a family allowance and the military person's only connection with the matter was a deduction from his pay. This entitlement ceased by internal limitation of law as soon as the military person ceased to be a member of the "fourth, fifth, sixth or seventh grades" which, in Schlafer's case, occurred in July 1943 (R. 8, line 28 *et seq*) and any payment after that date became unlawful. In July 1943 there was *no* "option" available to Schlafer and he had to take the quarters allowance provided by 56 Stat. 359 at 364 or nothing. It was not until October 1943 (appellant's brief, p. 4) that the "option" became available under which *by affirmative action* Schlafer could have taken steps to restore the family allowance to a status of legality. Absent such affirmative action, it continued to be unlawful. In an action for restitution, we are not of course concerned with blame or fault in any sense and there can be no question as a matter of law as to which payments were unlawful.

III.

Appellee indicates in Section III that appellant feels that the District Court held that Kenneth Schlafer was a necessary and indispensable party.

Appellant was forced to that assumption in order to understand the Court's action on any basis.

Laying aside the fact that appellee's quotation from *Dolan* (appellee's brief, p. 12) is dictum, we do not argue with the law set forth therein, *i.e.*, that an action against a marital community in Washington must join the husband as a party defendant. But appellant did not seek to sue a marital community in this action. The complaint was not, therefore, subject to dismissal on its face. Even in the *Dolan* case, if the action were properly held to be one against the marital community, it was subject to dismissal *only* because the husband *could not be joined*, the statute of limitations having run before he was served. Otherwise, the state court would have had to proceed under RCW 4.08.130 which states ". . . the court shall cause them [additional parties] to be brought in." In other words, if we assume (which we do not concede) that the District Court properly found this to be a cause against the marital community, the only proper result was to order the husband before the court — not dismiss the action. To a similar effect is Rule 2 (3), Rules of Pleading, Practice, and Procedure of the State of Washington, which reads in part:

> "No action . . . shall be defeated by the nonjoinder or misjoinder of parties. New parties may be added . . . by order of the court . . . ."

We assume for the purpose of this reasoning that appellee's statement in Third Defense as to Kenneth Schlafer's amenability to jurisdiction, etc. may be read in conjunction with appellee's Second Defense.

Inasmuch as the Court concluded (R. 10, Conclusion II) "That the payments . . . were made to the marital community composed of Kenneth Schlafer and Maud Schlafer . . . .", we assume that the Court did not find a joint indebtedness as pleaded in Third Defense (R. 6). While appellant never sought either determination and both would not be mutually inconsistent — *Churchill* v. *Miller*, 90 Wash. 694; 156 Pac. 851 (1916) — if we consider that the determination of marital community liability was correct, the dismissal was of course improper. FRCP 19(b) as noted in our opening brief simply renders it mandatory for the trial court to summon the husband. To the same effect is FRCP 21 which permits: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative. . . ."

Appellee makes the point on page 14 of the brief that, although appellant was on notice of appellee's claim of marital community indebtedness, appellant took no steps to cause Kenneth Schlafer to be summoned into the action. We find no authority for ap-

pellee's position. Rule 21 permits joinder on the motion of any party, and we should reason that the party on whom the burden lies is the party maintaining the necessity for an additional party. We note in 39 Am Jur, *Parties*, § 85,

> "In many jurisdictions the . . . rules of practice provide, . . . that when a complete determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in, thus imposing a mandatory duty upon the courts. . . . notwithstanding no objection to their absence has been raised by demurrer or answer."

We have found no case under the Federal Rules of Civil Procedure interpreting Rules 19 and 21 in this respect but the foregoing would appear reasonable and just. We note in the Cyclopedia of Federal Procedure, Third Edition, § 21.77, it is said,

> "Either upon objection taken by the defendant or by the court upon its own motion, the court may direct the amendment of the complaint to include the omitted or absent indispensable party or have the complaint dismissed if the amendment is not made. Of course, if the indispensable party is beyond the jurisdiction . . . the complaint must be denied."

It would seem to appellant that the burden was upon appellee to move the joinder of Kenneth Schlafer, it being appellee's theory of the case. Upon the Court's

determination that the indebtedness was community, it further appears that the Court should have directed Kenneth Schlafer summoned *sua sponte*, or have directed appellant to cause Kenneth Schlafer summoned. In any event, the action should not have been dismissed.

Respectfully submitted,

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